Supreme Court, U.S.
FILED

931352 NOV 16 1993 (1)

OFFICE OF THE CLERK
No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1993

A. G. Edwards Jr., petitioner

v.

Stewart R. Wilson, Attorney and
Wilson & Barrows, Ltd, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

A. G. Edwards Jr., pro se
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November 16, 1993

46pp

QUESTION PRESENTED

Should a Federal Court of Appeals retain and exercise jurisdiction over a legitimate Appeal when the Appellant's original Notice of Appeal was correctly mailed to Clerk of the District Court prior to expiration of the Fed.R.App.P. Rule 4(a) 30-day period in which to file Notice--even though this mailed Appellate Notice was not received in hand by the Clerk until shortly after the 30-day Notice period had closed? Appreciable inconsistency and exception to Federal Rule precepts exists throughout the Circuits governing how such matters are handled, as the within example illustrates.

LIST OF PARTIES

The parties to the proceedings below were the petitioner A. G. Edwards Jr. and the Respondents Stewart R. Wilson and Wilson & Barrows, Limited.

The Respondents now before this Court comprise the same Stewart R. Wilson and Wilson & Barrows, Limited.

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The Ninth Circuit's renunciation of jurisdiction in the within Matter

(i) has extended the finality

doctrine beyond the limits intended by both Federal Rules of Civil Procedure and of Appellate Procedure, and beyond mandates intended by the Rules Enabling Act (28. U.S.C. Sections 2072 - 2074);

(ii) contrasts and clashes with other circuit practice and with counterpart guidelines mandated in this Supreme Court; and

(iii) in violating both the spirit and the letter of Federal Rules and the Rules Enabling Act, transgresses the general concept that a Federal Court petitioner is entitled to equitable, efficient, cost-effective Substantial Justice.

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District Court Order of March 30, 1993 A.

Appeals Court Order of June 25, 1993 B.

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28 U.S.C. Section 2072 (in part) D.

Federal Rules of Appellate Procedure,
Rule 4(a), Rule 25, Rule 47 E.

Federal Rule of Civil Procedure Rule 9(b) F.

TABLE OF AUTHORITIES

Cases:

Bird v. Reese, 875 F.2d 256 (1989,C.A. 9)
Pages26,27.

Elliott v. Bronson, 872 F.2d 20 (C.A. 2d, 1989
30.

Haines v. Kerner, 404 U.S. 519, 520-21
29,30.

Lashley v. Ford,518 F.2d 749(1975,C.A. 5)
26,27.

Statutes:

28 U.S.C. Section 1254(1) 11,12.

28 U.S.C. Section 1291 12.

28 U.S.C. Section 1332 10.

28 U.S.C. Section 2072 - 2074
4,20,26,33 & Appndx D.

Other Authorities:

Federal Rules of Appellate Procedure Rule 4(a)
1,10,17,18,24,25,28,29 & Appndx E.

Federal Rules of Appellate Procedure Rule 25
22,25 & Appndx E.

Federal Rules of Appellate Procedure
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28.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

A. G. Edwards Jr., petitioner

v.

Stewart R. Wilson and Wilson & Barrows, Limited,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner A. G. Edwards Jr. respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered finally in the above entitled proceeding on August 18, 1993, which determination by this Supreme Court will then impose a much needed consistency as to how similar issues are determined throughout the Circuits.

OPINIONS BELOW

The Final Orders (June 25, 1993 and August 18, 1993) of United States Court of Appeals for the Ninth Circuit, not found among reported citations, are reprinted in the Appendix hereto, Items B and C, infra. No other Decisions, Opinions or Interpretations have come from the Ninth Circuit Court relating to this Matter.

JURISDICTION

Invoking Federal jurisdiction under 28 U.S.C. Section 1332, the petitioner brought this action in the District of Nevada. On March 30, 1993, the District of Nevada dismissed petitioner's Action with prejudice, having taken very limited evidence and having held no hearing upon the Merits of petitioner's Causes of Action.

Following petitioner's Appeal, the Ninth Circuit's June 25, 1993 Order renounced Jurisdiction and based this determination upon Fed.R.App.P. Rule 4(a)(1).

When the petitioner sought Appellate Court Reconsideration of Appellate Court Dismissal of his Appeal, the Ninth Circuit Denied this prayer on August 18, 1993, instructing the petitioner that "No

motions for reconsideration, rehearing, clarification, stay of mandate or any other submissions shall be filed or entertained in this closed docket".

The Jurisdiction of this Supreme Court to review the Judgments of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1). Submission of this Petition is timely when the established ninety-day period from the Ninth Circuits' August 18, 1993 final Reconsideration Denial extends through November 16, 1993.

STATUTES AND AUTHORITIES INVOLVED

28 U.S.C. Section 1291:

"Final Decision of district courts. The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ";

and 28 U.S.C. Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party. . . ."

STATEMENT OF THE CASE

Introduction

The petitioner, former client of Respondent Attorneys, was compelled by injuries deriving from Respondents' defective legal services to bring this 1992 Action which alleges improper and deficient Legal representation and related Claims, in United States District Court for the District of Nevada.

Petitioner was later compelled to Appeal when the District Court Dismissed this Action with prejudice absent any hearing or consideration upon the Merits.

Facts

As their defense after the filing of this Complaint, Respondents commenced a pattern and practice to intimidate the pro se petitioner, threatening him with counter-suits for abuse of process, with

counter-suits for malicious prosecution and with other intimidatory measures designed to bar this Matter ever coming to trial.

Initially bowing under Respondents' intimidatory programme, the pro se petitioner felt at first that he best yield his total Causes of Action and dismiss his entire Complaint, fearing otherwise the substantial adverse consequences portended by Respondents.

During his Nevada-based Deposition, the New Hampshire pro se petitioner was made to feel harassed and constrained to the degree that petitioner shortly thereafter proffered a letter of willingness to abandon his Action.

On additional reflection when back at his safer New Hampshire address, however, the petitioner determined that

he must not cave in and release Respondents from responsibility for their defective and wrongful legal services and from related damage they had wrought, no matter the magnitude of retributions which Respondents promised to bring down upon petitioner.

As the petitioner sought to continue to prosecute his Federal Court Action, Respondents Moved the District Court that petitioner's coerced but informal withdrawal letter be adjudged a binding permanent capitulation effectuating total cessation of petitioner's Action.

Petitioner's Responsive Opposition explained to the District Court that Respondents' intimidatory presentation had initially induced petitioner's inclination to capitulate. Petitioner further apprised the Court regarding

Respondent transgressions of Fed.R.Civ.P. Rule 9(b), constituting additional consequential bases for having the subject Action continue to full hearing before the Trier of Fact.

Permitting no hearing and taking no other evidence on any aspect of the Matter, the District Court issued its March 30, 1993 Order Granting Respondents' Motion and Dismissing petitioner's entire Action, with prejudice.

Following a period of careful reflection, the petitioner felt compelled to Appeal to the Ninth Circuit from the District Court's Dismissal. Petitioner on Wednesday, April 28, 1993 consigned his Notice of Appeal by mail from New Hampshire to the Nevada District Court Clerk as Federal Rules of Appellate Procedure instruct.

The Fed.R.App.P. designated 30-day Appeal period was set to expire on Thursday, April 29, 1993. Friday, April 30, 1993, the following day, marked the annual State of Nevada observance of "Arbor Day", held each year on the last Friday of April. Accordingly, petitioner's Notice of Appeal was not docketed by Clerk of the Court until the business day next following, which was a Monday, May 3, 1993. The petitioner has since been unable to establish what relevance this State of Nevada observance of "Arbor Day" bore to delayed receipt/docketing by the Court of petitioner's Notice of Appeal, and whether this Friday, April 30 Nevada-wide observation of that special occasion would then have rendered timely the Monday, May 3, next business day receipt/

docketing by the Clerk as determined under Fed.R.App.P. Rule 26(a).

Respondents nonetheless Moved the Court of Appeals that petitioner's Notice of Appeal had been filed out of time, i. e., at least one business day late, citing Fed.R.App.P. Rule 4(a) to aver that the Appeals Court thus lacked jurisdiction over petitioner's Appeal. The petitioner timely Opposed on several valid premises.

The Ninth Circuit nevertheless determined lack of Jurisdiction under Fed.R.App.P. Rule 4(a) and Granted Respondents' Motion, Dismissing petitioner's entire Appeal out of hand, with prejudice. This deprived the petitioner of any future Hearing upon his consequential Causes of Action.

Upon petitioner's timely Motion that the Ninth Circuit Reconsider its

Judgment, the Appellate Court then issued its August 18, 1993 Final Order of Denial, interdicting any further entreaty from petitioner in this entire Matter.

Petitioner was left only the alternative to bring his request for Writ of Certiorari within the prescribed 90 day period, premised upon perceived Appeals Court departures from applicable and governing Federal Rules in the Court's Dismissal process.

REASONS FOR GRANTING THE WRIT

SUMMARY

The Ninth Circuit's election to declare lack of Jurisdiction despite petitioner's timely mailing of his Notice of Appeal clashes with Federal Rule Mandates and with 28 U.S.C. Section 2072, the Rules Enabling Act. Specifically, the Ninth Circuit disavowal of Jurisdiction appears to transgress Fed.R.App.P. Rule 47 when, in instances such as this, the Court of Appeals regulates its practice in a manner inconsistent with Federal Rules of Appellate Procedure promulgated under authority of 28 U.S.C. 2072.

Moreover, there clearly exists within the Federal Appellate System a disharmony and basis for confusion when

vicariously applied guidelines govern the filing of Notices of Appeal and the inconsistent manner in which the various Circuits implement these filing mandates.

Because Notice of Appeal rulings as to timeliness do extensively vary among the several Circuits, there exists compelling need for guidance and direction in this Matter by this Supreme Court, and for the establishment of a constancy which any movant is entitled to enjoy in deriving the efficient,expedient and cost-effective Substantial Justice which Federal Rule guarantee.

The within example typifies Federal Circuit departures, although doubtless with the best of intentions, from Federal Rule specifics. Petitioner's experience herein constitutes a microcosm exemplifying the experience of many other

hapless appellants too constrained by circumstances to move this important question to a higher forum where it can then at last be properly adjudicated and from which standardized directives can then finally be implemented.

ITEMIZATION OF REASONS
FOR GRANTING THE WRIT

The following specific prescriptions substantiate how, contrary to petitioner's experience, any Notice of Appeal filing might properly be conducted and administered in accordance with the Federal Rules:

(i) Fed.R.App.P. Rule 25(c): "Service by mail is Complete on Mailing". This explicit advisory countenances no

exceptions and therefore instructs any movant that his filing is legitimate and binding when he timely (within the prescribed thirty-day period) deposits into the mail system his proper Notice of Appeal consigned to Clerk of the appropriate District Court.

(ii) Fed.R.App.P. Rule 26(c) parallels Fed.R.Civ.P. Rule 6(e) in stating:

"Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period".

Fed.R.Civ.P. Rule 6(e) is no less precise in its identical instruction. Both extend any deadline--including the 30-day Notice of Appeal deadline--three additional days when a party has received the pertinent antecedent document by

mail. Neither Rule 26(c) nor 6(e) condones any exception to this three-day supplement pertaining to a party's filing of his Notice of Appeal.

(iii) Fed.R.App.P. Rule 4(a) requires timely filing of an Appeal Notice

". . . with the clerk of the district court within 30 days after the entry of judgment or order appealed from. . . .".

Three additional days for mailing should rightfully then be added to this 30 day period as mandated by Fed.R.App.P. Rule 26(c). Actually, Federal Rules of Civil Procedure should then govern specifics of this particular Appeal Notice filing, since the accomplishment must be carried out with the Clerk of the District Court--and this means that Fed.R.Civ.P. Rule 6(e) should operate as it properly does in relationship to all other District Court activities--

again allowing an additional three days because

". . . the notice or paper is served upon the party by mail. . . .".

(iv) Fed.R.App.P. Rule 25(a) is precise in referring only to papers filed with the Appeals Court Clerk--not to those papers such as Notices of Appeal which Fed.R.App.P. Rule 4(a)(1) instructs be filed with the District Court Clerk:

"Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. . . . . filing shall not be timely unless the papers are received by the {Appeals Court} Clerk within the time fixed for filing, except that briefs and appendices shall be deemed. . . .". From Fed.R.App.P. Rule 25(a). (emphasis supplied)

When the notice of appeal is so filed with the District Court Clerk, then Federal Rules of Civil rather than Appellate Procedure apply, which has rendered petitioner's within filing also

timely:

Fed.R.Civ.P. Rule 5(b): "Service by mail is complete upon mailing"; and

Fed.R.Civ.P. Rule 6(e):

". . . 3 days shall be added to the prescribed period." .

(v) Lucid examination of the above precise Federal Rule phraseology confirms that frequently cited Case Law including Lashley v. Ford and Bird v. Reese significantly misread and misconstrue clear governing mandates, and this misinterpreted Case Law thus has done extensive and improper harm to a variety of previous appellants (including the undersigned) whose filings would have been found timely if applicable Federal Rule mandates had been scrupulously followed with the exact attention to detail intended by 28 U.S.C. ~ 2072.

(Lashley v. Ford Motor Co., 518 F.2d 749 (1975, C.A. 5); Bird v. Reese, 875 F.2d 256 (1989, C.A. 9).

(vi) Other Circuits, upon perceiving any Notice of Appeal to appear out of time, urge the errant party immediately to seek a District Court Extension of Time. The Ninth Circuit extended no such munificence to the petitioner in this instance. Had this Circuit Court timely advised the petitioner that his Appeal Notice was adjudged one day out of time, the petitioner could have promptly supplicated to the District Court for necessary Time Expansion and would not therefore have been deprived of his entire Action.

(vii) Other Circuits are willing, as is this Supreme Court, to adjudge a Notice

of Appeal timely when the paper is postmarked within the 30-day Appeal period. See Federal Circuit Rule 4(a):

"Rule 4. Appeal as of right -- When taken.

" (a) Trial court mail rule. -- If, pursuant to statute, the trial court has adopted a rule that deems a document filed on the date it is transmitted by a specific type of mail, a notice of appeal shall be deemed filed as provided by that rule."

See also Supreme Court Rule 29.2:

"To be timely filed, a document must actually be received by the clerk within the time specified for filing; or be sent to the Clerk by first class mail, postage pre-paid. . . ." (emphasis supplied).

It would appear incumbent upon all Circuit Courts to follow these very reasonable examples, rather than artificially to choke off legitimate Appeal proceedings on tenuous grounds of minor-degree untimeliness, as occurred in the within example.

(viii) In behalf of a minimally overdue Notice of Appeal, Fed.R.App.P. Rule 4(a)(5) prescribes a remedy not offered by the Ninth Circuit to this or to other petitioners--the opportunity and potential to demonstrate Excusable Neglect or Good Cause before the District Court in seeking a 30-day Extension which then would render his Appeal Notice timely received. By having denied petitioner this benefit, the Ninth Circuit has discriminated unreasonably against this and other similarly situated petitioners.

(ix) The pro se movant feels contrition to invoke applicable Case Law prescribing that an unrepresented party be held to less rigid standards than those required of counseled parties.

However, directives in Haines v.

Kerner, in Elliott v. Bronson and in many other references specify that a party without counsel shall have his unskilled appearance treated with more generous tolerance. The petitioner respectfully and hesitatingly invokes this guideline, which the Ninth Circuit chose not to follow. [Elliott v. Bronson, 872 F. 2d 20 (C.A. 2d, 1989) and Haines v. Kerner, 404 U.S. 519,520-21.]

(x) Any Court of Appeals, including the Ninth, sends an unfortunate message abroad when it employs improvident and inconsequential bases to deny any party's access to the Substantial Justice envisioned by Federal guidelines. Public confidence in the integrity and consistency of the Federal Court System are as important to maintain as, for instance, public confidence in the

printed value quantifier displayed upon United States paper currency. It would thus behoove all Courts in the Federal System to guard with jealousy the perception of impartiality, integrity and uniformity necessary for the Court System to function effectively and credibly. In the within instance, the Ninth Circuit's determinations and directives may not contribute to maintenance of these vital imperatives.

(xi) In the case of Ninth Circuit policy toward questions of Notice of Appeal Timeliness, it would appear that Local intra-circuit precedent is followed chiefly because that is the way it is established to be done--therefore, to break out of this pattern even when circumstances are compelling/extenuating would be awkward and unsettling

generally--even though the long established practice might transgress Federal Rules commands as well as considerations of Justiciability. For this reason, particularly, it appears incumbent that the Supreme Court establish precise rulings as to how these matters are to be decided throughout the Circuits.

Hence, only through a Petition for Certiorari to this Supreme Court and a subsequent favorable Hearing thereon could the herein and all similarly situated petitioners hope yet to have their valid Appeals heard and adjudicated, although initially entrapped by minor degrees of questionable untimeliness in Appeal Noticing.

(xii) Considerations of Due Process

require that specifics of the Federal Rules and of Section 2072 be followed to the letter, and that improvisation and misconstruction not cause Appeals dismissal controverting Federal Rule specifics. In frequent instances such as that within, where parties have their Notices of Appeals canceled through citation of specifics not actually found within the Federal Rules, Due Process considerations are extensively transgressed. To avoid Due Process infractions, strict reading of and compliance with the Federal Rules remains essential, as detailed in Items (i) through (viii), above.

SUMMARY

This Petition should be Granted because investigation has made it apparent that

the various Circuits manage Notice of Appeal timeliness questions in diverse and conflicting ways, including the subject Ninth Circuit, and not always in conformity with prevailing Federal Rules mandates.

Such variant pattern and practice among the Circuits surely merits this Supreme Court's establishment of a more reasoned and standardized policy. Particularly is this so when this Supreme Court itself accepts Petitions for Certiorari as timely if they are mailed (but not actually received in hand) within the specified time period allowed. (Petitioner's Notice of Appeal to the District Court in this Action was Dismissed although similarly mailed within the specified time period allowed.) It would therefore appear

incumbent that the Ninth and all other Circuit Courts of Appeals do follow the Supreme Court example and acknowledge valid Jurisdiction when any Notice of Appeal has been timely mailed.

CONCLUSION

For the above reasons, this Petition for Certiorari should be granted.

Petitioner expresses sincere appreciation to this Supreme Court for its consideration of his entreaty.

COROLLARY POINT

As a corollary point, the petitioner respectfully apprises this Court that his July 10, 1993 Motion for

Reconsideration which the Ninth Circuit Denied on August 18, 1993 was obviously not a Motion for Re-hearing, since no initial hearing had ever been permitted.

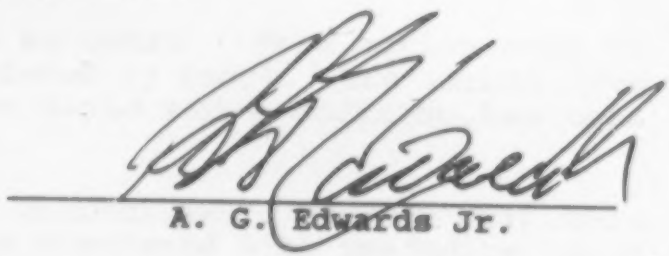
In addition, petitioner's Motion that the Ninth Circuit Reconsider its disavowal of Jurisdiction by an en banc appraisal in this instance did not constitute formal Fed.R.App.P. Rule 35(b) Suggestion for Hearing or Rehearing in banc--again because no Hearing had ever been allowed by this Court of Appeals in this Matter, conclusively evidenced where the Circuit Court in its dispositive August 18 Order did not adjudge this Motion for Reconsideration to be en banc Suggestion for Hearing or Rehearing. Consequently, the Final August 18, 1993 District Court Order which Denied petitioner's Motion

for Reconsideration would properly trigger commencement of the 90-day period in which to Petition for Writ of Certiorari.

In sum, this November 16, 1993 Petition for Writ of Certiorari is timely filed with this Supreme Court on this Date.

Respectfully submitted

by petitioner:



A. G. Edwards Jr.

November 16, 1993

Rural Route # 1, Box 208,
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APPENDIX

Appendix A

DISTRICT COURT ORDER OF MARCH 30, 1993:

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

A.G.Edwards Jr.

v.

Stewart R. Wilson, et al

JUDGMENT IN A CIVIL CASE

Case Number: CV-N-92-13-ECR

Decision by Court. This action came to be considered by Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice, each party to bear their own respective costs.

FILED
MARCH 30, 1993
Clerk, U.S.District Court
District of Nevada

March 30,1993 Carol C. Fitzgerald, Clerk
A.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.G.Edwards Jr.,
Plaintiff-Appellant,
and

Californians Against Waste, et al,
Intervenors-Appellees,

vs.

Stewart R. Wilson, Esq., et al.,
Defendants-Appellees)
)

No. 93-15934

DC#CV-92-00013-ECR
Nevada (Reno)

ORDER

Before Canby, Fernandez and T.G. Nelson, Circuit Judges

The motion to dismiss the appeal for lack of jurisdiction is granted. See Fed. R. App. P. 4(a)(1).

MoCal 6/21/93/sj

FILED JUNE 25, 1993
Cathy A. Catterson, Clerk
U.S.Court of Appeals

B.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. G. Edwards Jr.,
Plaintiff-Appellant,
and
Californians Against Waste, et al/.
Intervenors-Appellees,
vs.

Stewart R. Wilson, Esq., et al.,
Defendants-Appellees)
)

No. 93-15934
DC# 93-00013-ECR
Nevada (Reno)

Before: Canby, Fernandez and T.G. Nelson, Circuit Judges

ORDER

The motion for reconsideration of this court's June 25, 1993 order is denied. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submission shall be filed or entertained in this closed docket.

miscmemos/july (MoCal 6/12/93)

FILED
August 18, 1993
Cathy A. Catterson, Clerk
U. S. Court of Appeals
C.

Appendix D.

28 U.S.C. Section 2072 (in part):

"RULES OF PROCEDURE AND EVIDENCE; POWER TO PRESCRIBE

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge or enlarge any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have been taken."

Appendix E

Federal Rules of Appellate Procedure, Rule 4(a) (in part):

"(a) APPEALS IN CIVIL CASES

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . . ".

+ + + + +

Federal Rules of Appellate Procedure Rule 24(a) (in part):

"(a) FILING Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing. . .".

+ + + + +

Federal Rules of Appellate Procedure
Rule 47:

"RULES BY COURTS OF APPEALS

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. . . "

APPENDIX F

Federal Rules of Civil Procedure
Rule 9 (in part)

"PLEADING SPECIAL MATTERS
(b) FRAUD, MISTAKE, CONDITION OF MIND

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."